

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

74-1402 *WV*

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

NO. T-3313

BARBARA WISDOM, ET AL
Plaintiff Appellees

v.

NICHOLAS NORTON, ET AL
Defendant Appellants

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

**SUPPLEMENTAL APPENDIX
TO BRIEF OF APPELLANTS**

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TABLE OF CONTENTS

	<i>Page</i>
Chronological List of Relevant Docket Entries	ii
Complaint, Filed November 12, 1973	1
Handbook of Public Assistance Administration, §3410 et. seq., Attached as Exhibit A to Memorandum in Support of Order to Show Cause for a Temporary Restraining Order, Filed November 12, 1973	11
Motion for a Temporary Restraining Order, Filed November 12, 1973	14
Motion for a Preliminary Injunction, Filed December 4, 1973	16
Memorandum of Decision, January 2, 1974	18
Judgment Order and Decree, Entered February 21, 1974 Dated March 6, 1974	22
Letter to J. Zampano from Attorney for Plaintiffs Dated February 21, 1974	27
Testimony of Dr. Robert L. Goldenberg, Transcript December 7, 1973, pages 3 - 10	28
Testimony of Dr. Paul Harris, Transcript December 7, 1973, pages 28 - 30	33

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 12, 1973	Complaint
November 12, 1973	Motion for Temporary Restraining Order and Affidavits of Barbara Wisdom, Anna Tirado and Jane Croe, Filed
November 16, 1973	Temporary Restraining Order, Issued
December 4, 1973	Motion for Preliminary Injunction, Filed
December 7, 1973	Certification of Class Order, Issued
January 2, 1974	Memorandum of Decision, Issued
February 21, 1974	Judgment, Entered
March 6, 1974	Order and Decree, Filed

COMPLAINT, FILED NOVEMBER 12, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. 15906

BARBARA WISDOM, ANNA TIRADO, and JANE CROE,
individually and on behalf of their unborn children and on
behalf of all others similarly situated,

Plaintiffs

v.

NICHOLAS NORTON, Commissioner of Welfare, State of
Connecticut and VINCENT B. CAPUANO, Director of
Eligibility Services of the Connecticut State Welfare
Department

Defendants

COMPLAINT

Now come plaintiffs, by their attorneys, Marilyn Kaplan
Katz and Diane Schneiderman, and complain against
defendants as follows:

PRELIMINARY STATEMENT

Connecticut has elected to participate in the jointly
funded federal-state program of Aid to Families with
Dependent Children (hereinafter, "AFDC") established by
the Social Security Act, 42 U.S.C. Sec. 601, as amended,
et seq. Connecticut General Statutes Annotated Sec. 17-11.
States adopting this program are obligated to provide
benefits to all persons who meet the eligibility requirements
under Federal law. 42 U.S.C. Sec. 602 (a) (10). Federal law
requires payments with respect to a "dependent child who
has been deprived of parental support or care by reason of

continued absence from the home . . . of a parent." 42 U.S.C. Sec. 606 (a). Plaintiffs, individually and on behalf of all others similarly situated, seek to have this Court declare that the policy of the Connecticut State Welfare Department (hereinafter "Welfare Department") which denies benefits under AFDC to a mother and her unborn child until the actual birth of the child is a violation of the Equal Protection Clause of the United States Constitution, and is in conflict with the Social Security Act and Regulations issued pursuant thereto. Plaintiffs also seek preliminary and permanent injunctive relief against the continued enforcement of this policy.

I. JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1343 (3) and (4) and by Sec. 1331. The matter in controversy exceeds in value, exclusive of the interest and costs, \$10,000.

2. The plaintiffs' action for declaratory and injunctive relief and for damages, is authorized by 28 U.S.C. Secs. 2201 and 2202 and by Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments and by 42 U.S.C. Sec. 1983 which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and Laws of the United States.

II. THREE-JUDGE COURT

3. This is a proper case for determination by a three-judge court, pursuant to 28 U.S.C. Secs. 2281 and 2284, in that plaintiffs seek an injunction to restrain defendants, who are state officers, from the enforcement of a policy of state-wide applicability on grounds of its unconstitutionality.

III. PLAINTIFFS

4. Plaintiff ANNA TIRADO, 17 years old, resides in Bridgeport, Connecticut and is a citizen of the United States. It has been medically determined that she is three months pregnant. She is separated from her husband, the father of her unborn child, who is wholly and continuously absent. She is unemployed and has no source of income.

5. Plaintiff BARBARA WISDOM, 32 years old, resides in Rowayton, Connecticut and is a citizen of the United States. It has been medically determined that she is approximately eight months pregnant. She is separated from her husband, the father of her unborn child, who is wholly and continuously absent. Her only source of income is AFDC for herself and her two born children in the amount of \$263.47 per month.

6. Plaintiff JANE CROE, 20 years old, resides in New Haven, Connecticut and is a citizen of the United States. It has been medically determined that she is approximately seven months pregnant. She is unmarried; the father of her unborn child is wholly and continuously absent. Her only source of support is City Welfare in the amount of \$11.70 per week.

IV. CLASS ACTION

7. Plaintiffs bring this action pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class are those women who have been medically determined to be pregnant and their children, who meet all of the eligibility requirements for AFDC, but are unreasonably denied AFDC benefits until the actual birth of the child. This class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative

parties will thoroughly and adequately protect the interests of the class. In addition, the defendants, their agents and employees have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

V. DEFENDANTS

8. Defendant NICHOLAS NORTON, Commissioner of Welfare for the State of Connecticut is charged with the statewide supervision of the AFDC program. He is responsible for the administration of the Connecticut Public Assistance Code and for adopting and implementing the policies, rules and regulations of the Welfare Department.

9. Defendant VINCENT B. CAPUANO is the Director of Eligibility Services for the Welfare Department and is responsible for assuring statewide compliance with the eligibility requirements of the Connecticut Public Assistance Code.

VI. FACTUAL ALLEGATIONS

10. Until October 4th, 1973, plaintiff Tirado lived with her two children. Their sole source of support was AFDC benefits of \$263.97 per month.

11. On October 4th, 1973, plaintiff Tirado's estranged husband forcibly removed their two children who had been residing with the plaintiff and took them to Puerto Rico.

12. On October 5th, 1973, the Connecticut State Welfare Department sent plaintiff Tirado a notice that they were holding her October 16th, 1973 AFDC check pending an inquiry into her eligibility. (See copy of "Notice of Action" attached hereto as Exhibit "A").

13. On October 11th, 1973, Ms. Tirado went to the office of the State Welfare Department at 434 State Street,

Bridgeport, Connecticut. The Welfare worker, an agent of defendants Norton and Capuano, informed her that because her children were no longer living with her, she was no longer eligible for AFDC. She advised the Welfare worker that she was pregnant. The worker told her that she was not eligible on that basis for AFDC.

14. Plaintiff Wisdom lives with her two born children. Her sole source of support is AFDC benefits amounting to \$263.97 per month.

15. On August 1st, 1973, plaintiff Wisdom applied for AFDC at the office of the Welfare Department at 56 South Main Street, South Norwalk, Connecticut. She advised the Welfare worker, Mr. Aurelio, an agent of defendants Norton and Capuano, that she was pregnant. The Welfare worker informed her that she and her two born children were eligible for AFDC, but no special assistance would be available for her unborn child.

16. On October 1st, 1973, plaintiff Wisdom received a check for \$197.98, the amount of the first payment of a flat grant for a family of three, evidencing that she and her two born children were recipients of AFDC, but that her unborn child had been denied aid.

17. Plaintiff Croe lives with her grandmother who is receiving aid to the disabled as her only income.

18. In April, 1973, plaintiff Croe applied for benefits from the City Welfare Department in New Haven. She was later informed by a City Welfare worker that her application for AFDC probably would not be approved by the State Welfare Department because of their policy of excluding unborn children from their definition of "dependent child." Plaintiff Croe was discouraged from applying for AFDC at that time because of defendant's policy.

19. On October 17, 1973, plaintiff Croe applied for AFDC at the office of the State Welfare Department at 194 Bassett Street, New Haven, Connecticut. She was informed by the Welfare worker, an agent of the defendants Norton and Capuano, that she and her child were not considered eligible for AFDC benefits because the child was unborn and received formal notice on November 6, 1973 (a copy of the notice is attached hereto as Exhibit "B").

VII. FIRST COUNT

In this Count, plaintiffs claim:

1 - 19. Paragraphs 1 through 19 are hereby incorporated by reference the same as if fully pleaded.

20. The Social Security Act, 42 U.S.C. § 601, *et seq.*, establishes the AFDC Program. States adopting this program must provide benefits to those persons who meet the eligibility requirements under Federal law, 42 U.S.C. § 606 (a) (10). Payments are made under the program with respect to a "dependent child who has been deprived of parental support or care by reason of . . . continued absence from the home . . . of a parent." 42 U.S.C. § 606 (a).

21. The State of Connecticut has elected to participate in the AFDC Program, Connecticut General Statutes Annotated § 17-11.

22. It is a statewide policy of the Connecticut Welfare Department that women whose pregnancies have been medically determined and their unborn children are not eligible for AFDC until the actual birth of the child (See letter of defendant Capuano, attached hereto as Plaintiffs' Exhibit "C").

23. Plaintiffs Anna Tirado, Barbara Wisdom, Jane Croe and their unborn children meet all the eligibility require-

ments for AFDC under state and federal law, and would be found eligible except for the state policy which does not recognize the unborn child as a child for purposes of eligibility for AFDC.

24. As a result of the enforcement under color of state law of the Welfare Department policy, plaintiffs and the class they represent have been deprived, and will continue

to be deprived, of their rights guaranteed to them by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Said policy denies basic subsistence in the form of AFDC payments and medical care to unborn children and their mothers, but provides such assistance to all other children and their mothers. This classification is arbitrary and invidious in that it has no rational relationship to the purposes of the AFDC program.

25. As a result of the denial of their application for AFDC, Anna Tirado, Barbara Wisdom, Jane Croe and their unborn children are unable to secure wholly adequate medical care, medication, food and clothing, all of which would have been available if their applications for AFDC were approved. Such deprivations have caused plaintiffs and members of their class irreparable injury to their health and well-being, and they will continue to suffer the same unless and until the state policy complained of herein is declared unconstitutional and its enforcement enjoined by this Court.

VIII. SECOND COUNT

In this Count, plaintiffs claim:

1 - 19. Paragraphs 1 through 19 are hereby incorporated by reference the same as if fully pleaded.

26. Since at least 1946, regulations issued by the Department of Health, Education and Welfare, Handbook on

Public Assistance Administration, Part IV, Sec. 3412, have interpreted the word "child" as used in the Social Security Act, 42 U.S.C. Sec. 606 (a) to include:

"6. Unborn Children

When a mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to other children."

27. The substance of this provision was codified on February 27th, 1971, in The Code of Federal Regulations, 45 C.F.R. 233.90 (attached hereto as Plaintiffs' Exhibit "D"):

Section 233.90. Factors Specific to AFDC

(c) Federal Financial Participation

(2) Federal financial participation is available in:

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

* * *

(3) Federal financial participation (at the 50 per cent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of incapacity of a parent or pregnancy of a mother.

28. Anna Tirado, Barbara Wisdom, Jane Croe and their unborn children, and all other similarly situated are and were eligible for AFDC under federal standards.

29. The policy of defendants Norton and Capuano that Anna Tirado, Barbara Wisdom, Jane Croe and their unborn children are not eligible for AFDC until the birth of the child is contrary to the intention of the Social Security Act and the regulations issued pursuant thereto and is therefore invalid under the Supremacy Clause of the Constitution of the United States.

30. The plaintiffs have no adequate remedy at law.

IX. PRAYER FOR RELIEF

WHEREFORE, plaintiffs, individually and on behalf of all others similarly situated, pray that this Honorable Court:

1. Convene a three-judge District Court pursuant to 28 U.S.C. Secs. 2281 and 2284 to hear and determine this controversy;

2. Pending a hearing and determination on by the three-judge district court, grant a temporary restraining order restraining defendants, their successors in office and participation with them, from denying the AFDC applications of plaintiffs and members of the plaintiff class;

3. Declare that the policy of defendants denying AFDC to mothers and their unborn children is unconstitutional on its face and as applied to plaintiffs for the reason that it violates the Fourteenth Amendment to the United States Constitution;

4. Declare that the policy of defendants denying AFDC to unborn children and their mothers conflicts with the Social Security Act and regulations issued thereunder, and is therefore invalid under the Supremacy Clause of the United States Constitution;

5. Enter preliminary and permanent injunctions enjoining defendants, their successors in office, agents, and employees, and all other persons in active concert and participation with them, from refusing to grant to plaintiffs and members of the plaintiff class AFDC benefits; and ordering payment of all assistance benefits wrongfully denied and withheld.

6. Allow plaintiffs their costs herein, and also grant them and all other persons similarly situated such additional or alternative relief as may seem to this Court just, proper, and equitable.

Respectfully submitted,

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Attorneys for Plaintiffs

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, § 3410 ET. SEQ., ATTACHED AS EXHIBIT A TO MEMORANDUM IN SUPPORT OF ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, FILED NOVEMBER 12, 1973.

EXHIBIT A

3410-3412

Handbook of Public Assistance Administration

Part IV.

Eligibility and Payments to Individuals

Factors Applicable to Aid to Dependent Children

3400-3499

11/4/46

3410. *Deprivation of Parental Support or Care*

3411. *Provision of the Act*

Title IV, section 406 (a) reads:

"The term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ."

3412. *Interpretation*

This provision sets forth the two eligibility factors, "need" and "deprivation of parental support or care," on which Federal participation is conditioned. The provision requires that both need and deprivation of parental support or care exist in the individual case but does not require that an affirmative showing be made that a causal relationship exists in the individual case.

Under the act, the term "deprived of parental support or care" is interpreted to encompass the situation of any child who is in need and otherwise eligible, and whose parent either has died, has a physical or mental incapacity, or is prevented by continued absence from providing maintenance, physical care, and guidance for his children. In this interpretation "parent" may mean either the father or the mother. Since the interpretation relates to parental support or care, it is equally applicable whether the parent was the chief breadwinner or devoted himself or herself primarily to the care of the child.

Situations within the scope of the term "deprivation" are as follows:

1. *Children Living With Both Natural Parents*

Children may be included when living with their natural mother and father, if they are deprived of parental support or care by reason of the incapacity of either parent.

2. *Children Living With Either Father or Mother*

Children may be included when deprived of support or care by reason of the death, incapacity, or continued absence of either the mother or father.

3. *Legally Adopted Children*

Legally adopted children are included on the basis of deprivation of parental support or care due to the death, continued absence, or incapacity of one or both of the parents who adopted the child, rather than on the basis of deprivation of the natural parent's support or care. This interpretation recognizes the current development of social legislation designed

to effect complete substitution for the natural parents, in the relationship sustained by a child and the parents who adopt him.

4. *Children Living in Home of Stepparents*

A child living in the home of a stepparent who is not required by State law to assume a parental role, may be included on the ground that he lacks the support or care of the natural parent who is dead or absent. In the absence of legal obligation to assume a parental role, a stepparent is no more of a "parent" than any other person acting in loco parentis. In these situations, the only safeguard to the child's right to assistance is his eligibility under the condition of being deprived of the support or care of the natural parent. In States in which the stepparent is required to assume a parental role, a child may be deprived of support or care if the stepparent is dead, absent, or incapacitated.

5. *Children of Unmarried Parents*

Children of unmarried parents may be included within the scope of Title IV on the same basis as children of married parents. The act provides for the use of aid to dependent children as a maintenance resource available on equal terms to all children who meet eligibility conditions.

6. *Unborn Children*

When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to other children.

3414. *Federal Financial Participation*

For each individual for whose assistance payments Federal participation is claimed, deprivation of support or care must have been determined in accordance with the requirements for the approval of State plans except that when the State definition is less liberal than the Federal interpretation, Federal participation may be claimed on the basis of the latter.

MOTION FOR A TEMPORARY RESTRAINING ORDER,
FILED NOVEMBER 12, 1973.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL ACTION NO. 15906

BARBARA WISDOM, et al.,
Plaintiffs

v.

NICHOLAS NORTON, Commissioner of Welfare, et al.,
Defendants

MOTION FOR A
TEMPORARY RESTRAINING ORDER

Plaintiffs, by their attorneys, hereby move this Honorable Court to issue:

1. An order pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23 (a), (b) (2) because the class, consisting of all women who have been medically determined to be pregnant and their unborn children, who meet all of the eligibility requirements for AFDC, but are illegally and unconstitutionally denied AFDC

benefits until the actual birth of the child, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the class; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted and refused to act on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. A temporary restraining order pursuant to 28 U.S.C. § 2284 (3) restraining the defendants, their successors in office, agents and employees, and all other persons in active concert and participating with them from refusing, pending the hearing and determination by a three-judge Court convened pursuant to 28 U.S.C. §§ 2281 and 2284, to provide benefits to plaintiffs, otherwise eligible mothers and their unborn children, and all persons similarly situated on the grounds that the child is not born.

Plaintiffs seek this relief for themselves and all others similarly situated on the grounds that:

(a) they and all others similarly situated are each suffering irreparable damage in that they are without means to provide themselves with the basic necessities requisite for a minimum standard of decency and health and will continue to suffer even greater deprivation unless they are granted AFDC benefits;

(b) the issuance of a temporary restraining order will not cause undue inconvenience or loss to the defendants but will prevent irreparable damage to the plaintiffs and others similarly situated;

(c) the policy that deprives plaintiffs and all others similarly situated of AFDC benefits violates the Fourteenth

Amendment to the United States Constitution and, because it violates the Social Security Act and regulations issued thereunder, is invalid under the Supremacy Clause of the United States Constitution;

(d) Plaintiffs have no adequate remedy at law, as set forth more fully in the attached complaint and the affidavits of the plaintiffs, attached hereto.

MARILYN KAPLAN KATZ
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366-4955

Attorney for the Plaintiff

MOTION FOR A PRELIMINARY INJUNCTION, FILED
DECEMBER 4, 1973.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL ACTION NO. 15906

BARBARA WISDOM, et al.,
Plaintiffs

v.

NICHOLAS NORTON, Commissioner of Welfare, et al.,
Defendants

**MOTION FOR A
PRELIMINARY INJUNCTION**

Plaintiffs, by their attorneys, hereby move this Honorable Court to issue:

1. An order pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure determining that this action may

properly proceed as a class action pursuant to Rule 23 (a), (b) (2) because the class, consisting of all women who have been medically determined to be pregnant and their unborn children, who meet all of the eligibility requirements for AFDC, but are illegally and unconstitutionally denied AFDC benefits until the actual birth of the child, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the class; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted and refused to act on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. A preliminary injunction restraining the defendants, their successors in office, agents and employees, and all other persons in active concert and participating with them from refusing to provide benefits to plaintiffs, otherwise eligible mothers and their unborn children, and all persons similarly situated on the grounds that the child is not born.

Plaintiffs seek this relief for themselves and all others similarly situated on the grounds that:

(a) they and all others similarly situated are each suffering irreparable damage in that they are without means to provide themselves with the basic necessities requisite for a minimum standard of decency and health and will continue to suffer even greater deprivation unless they are granted AFDC benefits;

(b) the issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable damage to the plaintiffs and others similarly situated;

(c) the policy that deprives plaintiffs and all others similarly situated of AFDC benefits violates the Fourteenth Amendment to the United States Constitution and, because it violates the Social Security Act and regulations issued thereunder is invalid under the Supremacy Clause of the United States Constitution;

(d) Plaintiffs have no adequate remedy at law, as set forth more fully in the attached complaint and the affidavits of the plaintiffs, attached hereto.

MARILYN KAPLAN KATZ
Bridgeport Legal Services, Inc.
412 East Main Street
Bridgeport, Connecticut 06608
366-4955

Attorney for the Plaintiff

MEMORANDUM OF DECISION, JANUARY 2, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL NO. 15906

BARBARA WISDOM, ANNA TIRADO, and JANE CROE,
individually and on behalf of their unborn children and on
behalf of all others similarly situated,

v.

NICHOLAS NORTON, Commissioner of Welfare, State of
Connecticut and VINCENT B. CAPUANO, Director of
Eligibility Services of the Connecticut State Welfare
Department

MEMORANDUM OF DECISION

The plaintiffs instituted this civil rights class action,
pursuant to the provisions of 42 U.S.C. § 1983, seeking

declaratory and injunctive relief against the policy of the Connecticut Department of Welfare which denies Aid to Families with Dependent Children (AFDC) benefits to pregnant mothers and their unborn children. Jurisdiction of the cause is conferred by 28 U.S.C. § 1343 (3) and (4), and by 28 U.S.C. § 2201.

Following oral arguments of counsel on November 16, 1973, this Court issued a temporary restraining order, enjoining defendants from refusing to provide AFDC benefits to the three named plaintiffs and their unborn children. At the evidentiary hearing on the plaintiffs' application for a preliminary injunction, held on December 7, 1973, the Court consolidated the motion for an injunction with the trial on the merits under Rule 65 (a) (2), F. R. Civ. P., heard the testimony of six witnesses, found that the prerequisites to a valid class action had been met pursuant to Rule 23 (a) and (b) (2), F. R. Civ. P., dissolved the temporary restraining order, and set a schedule for the filing of briefs. It was further agreed that if the Court ruled that the plaintiffs were entitled to relief, the appropriate form of relief and the defendants' motion for a stay would be determined at a subsequent hearing.

It is undisputed that the plaintiff class of pregnant women meet all the eligibility requirements for AFDC assistance, but due to state policy they are denied benefits until the birth of their children. Uncontroverted medical testimony also established that proper nutrition and medical attention during pregnancy are important to protect the mother's health, which in turn affects the development and health of the child.

The plaintiffs contend that the state's denial of benefits conflicts with the eligibility provisions of the Social Security Act, 42 U.S.C. § 606 (a), and thus is invalid under the Supremacy Clause. Alternatively, they assert that the state's

policy violates their rights under the Equal Protection Clause of the Constitution. The defendants, on the other hand, argue that the word "child" in the context of § 606 (a) of the Act contemplates only a "person between birth and puberty", and that the plaintiffs lack standing to sue under the Fourteenth Amendment.

In 1935 Congress enacted the Social Security Act which, among other things, established the AFDC program as a federal grant-in-aid project concerned with the fundamental needs of economically deprived and dependent children. The Act provides in relevant part that AFDC benefits shall be awarded to a needy "dependent child" who "has been deprived of paternal support or care by reason of . . . continued absence from the home . . . of a parent." 42 U.S.C. § 606 (a). However, the Act is silent on the question of aid to the unborn. The plaintiffs claim the term "dependent child" encompasses an unborn child and that since a pregnant woman is eligible under the federal statute, the State of Connecticut cannot pursue a more restrictive eligibility requirement without violating the Supremacy Clause. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

At least nine district courts have considered the identical issue presented to this Court. Seven have held that a state policy which withholds AFDC assistance to an eligible pregnant mother until the child is born is inconsistent with the Act and therefore invalid under the Supremacy Clause. See *Green v. Stanton*, 364 F. Supp. 123 (N. D. Ind. 1973); *Doe v. Lukhard*, 363 F. Supp. 823 (E. D. Va. 1973); *Harris v. Mississippi State Dept. of Public Welfare*, 363 F. Supp. 1293 (N. D. Miss. 1973); *Alcala v. Burns*, 362 F. Supp. 180 (S. D. Iowa 1973); *Wilson v. Weaver*, 358 F. Supp. 1147 (N. D. Ill. 1972); *Jones v. Graham*, Civ. No. 73-L235 (D. Neb. September

5, 1973); *Tillman v. Endsley*, Civ. No. 73-1476 (S. D. Fla. October 1, 1973).

This Court finds the reasoning of these cases to be persuasive. No useful purpose will be served, however, by reviewing or reiterating the comprehensive discussions of the case authorities, historical analyses, statutory law, applicable regulations of the Department of Health, Education and Welfare, and comments of the distinguished jurists who so ably ruled in the aforementioned cases. It is sufficient for purposes here merely to summarize the reasons adopted by this Court which impel a similar result:

1. The definition of "child" includes a "fetus", an "unborn human being", and an "unborn infant".

2. The medical evidence clearly indicated that inclusion of the unborn child as a "dependent child" is consistent with the purposes of the Act.

3. No credible argument can be advanced that Congress intended to exclude an unborn child from coverage of the Act. An unborn child is not any less "needy" or "dependent" than a child who has been born.

4. HEW regulations have permitted payments to unborn children; the optional features of the administrative regulations, however, are violative of the provisions of the Act.

5. Both houses of the 92nd Congress proposed amendments to the Act which would have excluded unborn children, but the amendments were not enacted.

6. In the absence of express congressional authorization, a state policy that excludes persons eligible for assistance under federal standards is in conflict with the Act and is invalid under the Supremacy Clause.

Two district courts have sustained a state's policy decision to exclude an unborn child from the benefits of its AFDC program. *Parks v. Hardin*, 354 F. Supp. 620 (N. D. Ga. 1973); *Murrow v. Clifford*, Civ. No. 114-73 (D. N. J. June 12, 1973). With deference, and for the reasons stated by Chief Judge Hanson in *Alcala v. Burns*, supra, 362 F. Supp. at 185-186, this Court declines to follow the rulings in *Parks* and *Murrow*. See also *Tillman v. Endsley*, supra.

Accordingly, judgment for the plaintiffs may enter; settle order on notice, at which time the Court will also hear the defendants' Motion To Stay.

Dated at New Haven, Connecticut, this 2nd day of January, 1974.

ROBERT C. ZAMPANO
United States District Judge

JUDGMENT ORDER AND DECREE, ENTERED
FEBRUARY 21, 1974 DATED MARCH 6, 1974.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 15906

BARBARA WISDOM, et al.,
Plaintiffs

v.

NICHOLAS NORTON, Commissioner of Welfare, et al.,
Defendants

ORDER

This cause having come on for hearing pursuant to this Court's Memorandum of Decision, dated January 2, 1974, and the Court having determined that the several provisions

of this Decree are necessary to afford the plaintiffs and members of the plaintiff class the full relief to which they are entitled:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the policy of the Connecticut State Welfare Department which does not recognize an unborn child as a child for the purpose of eligibility for AFDC and Medical Assistance is contrary to Section 402 (a) (10) and 406 (a) of the Social Security Act, 42 U.S.C. § 602 (a) (10) and 606 (a), and regulations promulgated pursuant thereto, and is invalid insofar as it denies AFDC and Medical Assistance benefits to needy pregnant mothers and their unborn children who are otherwise eligible for such benefits.

2. That during such period as the State of Connecticut continues to participate in AFDC program authorized by the Social Security Act, the defendants, their agents, including personnel at all of the district offices in the State of Connecticut, their employees, attorneys, and all other persons in active concert or participation with them, are hereby permanently enjoined from failing to furnish AFDC and Medical Assistance to pregnant mothers and their unborn children who meet all of the eligibility conditions for AFDC save the invalid Connecticut requirement limiting AFDC to children who are born.

3. That the defendants are directed to compute for each of the named plaintiffs, Barbara Wisdom, Anna Tirado and Jane Croe and their unborn children, the amount of assistance benefits from November 12, 1973, the date of the filing of the lawsuit, for herself and/or her unborn child, and to remit said amount, less the amount of State (AFDC) and general assistance benefits actually received for said period, within fifteen (15) days. The defendants are further directed to remit to the named plaintiffs moneys for any

necessary medical expenses incurred in establishing the fact of pregnancy or since the pregnancy was established, less the amount of State (Medical Assistance) and general assistance actually paid for said expenses.

4. That the defendants, their agents, including personnel at all of the district offices in the State of Connecticut, their employees, attorneys, and all other persons in active concert or participation with them, are hereby enjoined and directed to remit to each woman who was pregnant between January 2, 1974, the date of judgment in this case, and the date paragraph 2 of this order is implemented, and who at that time during her pregnancy met all of the eligibility conditions for AFDC save the Connecticut policy invalidated herein, all AFDC benefits on her behalf and on behalf of her unborn child, including payments for medical expenses and drugs which would have been covered under the Medical Assistance program, to which she was entitled but did not receive because of the Connecticut policy declared invalid in paragraph 1 of this order, less the amount of State and general assistance benefits actually received during that period.

5. That the defendants, their agents, including personnel at all of the district offices in the State of Connecticut, their employees, attorneys, and all other persons in active concert or participation with them, are hereby directed and enjoined to remit to any woman who, between January 2, 1974, the date of judgment in this case, and the date paragraph 2 of this order is implemented, gave birth to a child while receiving AFDC, all AFDC benefits to which she was entitled on behalf of her unborn child from January 2, 1974, but did not receive because of the Connecticut policy declared invalid in paragraph 1 of this order, less the amount of State and general assistance benefits actually received during that period.

6. Within 15 days from the date this order is implemented, defendants Nicholas Norton and Vincent Capuano shall submit to the Court and to plaintiffs' attorneys a detailed statement as to the method for effectuating relief required by paragraphs 4 and 5 *supra*. This detailed statement shall, among other things, specify the procedures for identifying those persons entitled to assistance pursuant to paragraphs 4 and 5; those persons to whom notices will be sent in addition to those specified in paragraph 8, *infra*; the actual notices to be sent; and the procedures for claiming such payments by persons eligible therefor who are not receiving public assistance at the time the order is implemented. The statement shall also provide that the assistance payments will be mailed with an explanatory letter, said letter having first been approved by plaintiffs' attorneys. Any disputes between the parties as to whether the procedures and the methods in the statement by defendants will fulfill the requirements of this Decree will be resolved by the Court. All of the relief ordered in paragraphs 4 and 5 *supra*, shall be effectuated no later than two months from the entry of this order, at which time the Commissioner of the Connecticut State Welfare Department shall submit an affidavit to the Court stating that all of the relief provided for in this order has been effectuated.

7. That defendants Norton and Capuano and the Connecticut State Welfare Department shall forthwith mail a notice, approved by the plaintiffs' attorneys, to all women in the State of Connecticut receiving public assistance of any kind including either cash benefits or medical benefits, stating that: needy pregnant women in Connecticut may now receive, and should apply for, AFDC and Medical Assistance for themselves and their unborn children if they otherwise meet the eligibility requirements for AFDC; that AFDC recipients now pregnant are entitled to an additional allowance on behalf of the unborn child; and that certain

persons, as set forth in paragraphs 4 and 5, *supra*, are entitled to assistance benefits as of January 2, 1974, the date of the judgment in this case. That said defendants shall further release a statement to the media in the same manner and to the same extent as other press releases to inform the public, and particularly potential public assistance recipients, of the new policy of the Connecticut State Welfare Department with respect to AFDC and Medical Assistance benefits for pregnant women and their unborn children.

8. That defendants Nicholas Norton and Vincent Capuano shall within fifteen (15) days hereof issue an official directive of the Connecticut State Welfare Department directed to all appropriate welfare departments in the State of Connecticut, including district offices and all offices administering general assistance, incorporating the essence of this order (sic) and directing full compliance with the provisions of this order. Said defendant shall also issue a Manual Release within 30 days revising the Connecticut State Welfare Manual to state expressly that an unborn child is a child for purposes of eligibility for AFDC and Medical Assistance.

9. That any AFDC benefits to be received pursuant to this order shall not be deemed income or resources pursuant to any provision of the Connecticut General Statutes or Connecticut State Welfare Department regulations.

10. This Court in the interest of judicial economy, shall specifically retain continuing jurisdiction over this cause for purposes of determining the issue of restitution to the plaintiff class, pending the decision of the Supreme Court in *Jordan v. Edelman*, No. 72-1410. This Court shall in addition retain continuing jurisdiction over this cause for all other purposes.

ROBERT C. ZAMPANO

Judge, United States District Court

DATED:

LETTER TO J. ZAMPANO FROM ATTORNEY FOR
PLAINTIFFS DATED FEBRUARY 21, 1974

Fairfield County Legal
Services, Inc.
412 East Main Street
Bridgeport, Connecticut 06608
22 February 1974

Honorable Robert Zampano
United States District Court
New Haven, Connecticut 06510

Dear Judge Zampano:

At the hearing held earlier today, February 21, 1974, your honor requested that the plaintiffs submit a revised order incorporating the modifications made by the Court to the Order originally proposed by plaintiffs. Enclosed is the revised order.

Specifically by paragraph:

Paragraph 2. The penalty of withdrawal of federal funds was deleted from paragraph 2 of the order;

Paragraph 3. In paragraph 3 of the order, the date of the filing of the lawsuit, November 12, 1973, was substituted for the dates of application;

Paragraphs 4 and 5. In paragraphs 4 and 5 of the order, the date of the judgment in this case, January 2, 1974, was substituted for the date, December 20, 1971, thereby deleting any restitution and making the relief to members of the plaintiff class wholly prospective;

Paragraph 6. In paragraph 6 of the order, the date "that this order is implemented" was substituted for the date

"of this order" for purposes of computing the time by which defendants must submit their plan for implementation of the class relief; and "two months" is substituted for "six months" for the effectuation of the relief, because of the wholly prospective nature of said relief;

Paragraph 7. In paragraph 7 of the order, the notice of entitlement to "assistance benefits as of January 2, 1974, the date of the judgment in this case" is substituted for notice of entitlement to "restitution of benefits wrongfully denied";

Paragraph 10. A sentence is added to paragraph 10 of the order stating that the Court, in the interest of judicial economy, is specifically retaining jurisdiction over the issue of restitution to the plaintiff class, pending the *Jordan* decision;

Paragraph 11. Paragraph 11 is deleted.

We trust this comports with the Court's instructions.

Sincerely,

MARILYN KAPLAN KATZ
Attorney for Plaintiffs

TESTIMONY OF DR. ROBERT L. GOLDENBERG,
TRANSCRIPT DECEMBER 7, 1973, PAGES 3 - 10.

A. At present I am responsible for the running of the women's clinic at Yale-New Haven Hospital.

Q. And could you describe the population which this clinic consists of?

A. The population in the clinic comprises a large segment of the black, Puerto Rican and poor white communities in the City of New Haven and surrounding areas.

Q. What are the general recommendations which you make to the pregnant women who are patients as far as prenatal care?

A. We attempt to follow pregnant women from as early in pregnancy as we possible can, we attempt to, at least, in terms of nutrition, to insure an adequate diet, and this has especially over the last several years become a very important part of the counselling we provide for these women. We have a dietician in attendance full time in the clinic and every one of the residents and midwives who sees patients at least once a month spends 15 or 20 minutes talking with the patients about the kind of diet in an attempt to get them to eat an adequate diet.

Q. And what specifically is considered an adequate diet for a pregnant woman?

A. In terms of calories we try to recommend that they eat at least — at least 20 to 25 hundred calories and in some cases, over three thousand calories, that the amount protein in the diet range at least from one hundred grams to sometimes as much as 150 grams and that it includes adequate quantities of iron, vitamins, calcium and the other recommended minerals.

Q. And is this different from the diet normally consumed by a woman, especially a poor woman, in New Haven?

A. It's very, very different. Most of the women that we see have not any experience with this kind of diet at all, eat perhaps a fourth of the recommended protein, in terms of calories, probably eat around 16 or 18 hundred calories, not the 25 to 26 that we would often recommend, and rarely eat any — you know, much in the way of foods containing iron or vitamins. So it's a very, very different kind of diet.

Q. Has it been your experience that this diet costs more to a woman than what she normally spends on food?

A. Unquestionably. Many of the women just complain

that when we recommend the kinds of food that we do, that they just cannot afford, you know, on this — either the money they're making or the state assistance that they get, the city assistance, the kinds of food we recommend.

Q. Has it been your experience that women failed to follow the diet for this reason?

A. Very often.

Q. Are there special problems in nutrition for a woman who has not been well nourished before conception?

A. Absolutely. These women, just in terms of the babies they produce, have much less success in producing good babies because of inadequate nutrition prior to pregnancy and if this continues throughout the pregnancy, there's further damage in general to the kinds of offspring they have.

Q. Can you just outline briefly in a few sentences the effect of maternal nutrition on the baby? In other words, why it is that you recommend this particular kind of diet?

A. Just in a general sense, inadequately nourished women produce babies that just are not nearly as good as babies from well nourished women, and these women who have — who are malnourished or inadequately nourished have a much higher incidence of premature babies, babies that are smaller than normal, of babies that end up having, you know, lower I.Q.s, cerebral palsy, and when you look at their neurological development later on in life, there's just much, much less than babies from adequately nourished women.

Q. Are there any other medical problems that occur in pregnancy that you feel are attributable to the nutrition that can be corrected through proper nutrition?

A. One of the big problems that we see in especially the poor communities, especially the black community, is toxemia, and this is a disease which can go on to things like

coma, seizures and death of the mother, death of the baby; and this has been found to relate very closely to the — it's seen in a much higher incidence in women who are mal-nourished.

Q. And have you also observed a problem with anemia in pregnant women?

A. Yes. Absolutely. Women who have been inadequately nourished and have inadequate vitamin intake prior to pregnancy or throughout the pregnancy, you know, are often anemic and often suffer, you know, consequences of the anemia during delivery.

Q. What are those consequences?

A. The consequences of anemia in general, they can — if they have any emergency, they can go into shock. It's — if the mother is anemic in general, the babies, again, do less well. It's things like that.

Q. Have you noticed in your clinic patients an incidence of failure to gain a recommended amount of weight?

A. I would — yes. There are certainly many women who because of inadequate diet do not gain the recommended weight for our clinic, which is about 27 to 30 pounds. Women who gain less than this on the average just don't have as good babies, the babies are smaller and throughout life generally do less well; and one of the problems even — with our population, even when they do gain the recommended weight, it's mostly because they're eating a very high carbohydrate diet and they put on a lot of, you know, fat, that they don't get the kinds of foods that are necessary to grow a good baby.

Q. So you are saying, even though the women gain the recommended amount of weight, the babies are still small?

A. Because of inadequate protein diet.

Q. What are some of the disabilities associated with this low birth weight?

A. Again, the disabilities are: the babies when they grow up don't grow up as fast, they're smaller, they're more likely to be handicapped neurologically and in general their I.Q.s are lower.

MR. MCGREGOR: I don't want to object, but the doctor's been saying "more likely". Unless he's going to it in terms of "reasonable medical probability", I would object to it, and I move that most of his answers be stricken.

THE COURT: I am not going to strike his answer because I assume, Dr. Goldenberg — and if I am incorrect, please set it straight — you are speaking and giving opinions based on a reasonable degree of medical certainty?

THE WITNESS: Right. There are innumerable studies which will back up every one of the points that I have made by very well known medical authorities, and you can't say in every case that inadequate diet — and inadequate diet will produce a bad baby, but statistically, over and over and over again, this is what will happen; and when I say very likely, I mean very likely.

Q. Just one final question. You have alluded, and I have alluded, to the disabilities borne by women as they come into their pregnancy because they have been poor, can you make any sort of judgment on the efficacies of intervention during the pregnancy in helping these women produce good babies?

A. Sure. There — again, there are innumerable studies, which I can quote for you if you like, which show that if you take a woman who has in the past produced low birth weight babies.

MR. MCGREGOR: I would object to these studies unless he's got a book here, a recognized authority in the field and puts it in so he can be cross-examined.

THE WITNESS: Excuse me, I can get them for you if you like.

THE COURT: Just a minute, Doctor. Let me first hear the objection. Go ahead. Or did you finish your objection?

MR. MCGREGOR: Yes.

THE COURT: We have to start to recognize that he has been conceded an expert. Doctor, if you are questioned about the bases for your opinion, O.K., then we can get into all your studies and so forth, and articles and your experience. However, at the present time I will take the answers based upon your knowledge and experience in the field without reference to a particular treatise. Now, you are established as an expert, you may answer the questions based upon your knowledge and experience within a reasonable degree of medical certainty. Go ahead.

A. Can you repeat the question?

Q. The question was as to the efficacy of intervention during pregnancy with a previously malnourished mother.

A. There is no question that providing women who in the past produced poor babies because of an inadequate diet that when given an adequate diet will produce good average healthy babies.

TESTIMONY OF DR. PAUL HARRIS, TRANSCRIPT
DECEMBER 7, 1973, PAGES 28 - 30.

Q. Just one question. Is it your impression that these deprivations, the results of these deprivations during

pregnancy can be corrected later if the child receives proper care after birth?

A. Oh. Some of the effects cannot be corrected, which is the reason — and some of them we can improve upon, but there are — we feel that there are — not feel, there is evidence to show that there are effects that cannot be corrected and, as a matter of fact, the department of — Yale Medical School has set up a department of — a department of perinatology. For the first time, this — there is a combination of obstetrics and gynecology with pediatrics in one department to consider and deal with the problems of perinatal problems so that — because we think that the problems of the — that we are faced with as pediatricians when an infant is born do not start at birth, they start much further back during pregnancy, but even prior to that, and in a study, just to give you a — a study that we did on the incidence of nutritional anemia in our area, we found, as we expected, a high incidence of anemia. But we found also that in the women from age 14 to 21, which is the age population that we're working with to a considerable extent, 14 per cent of these women or young women were anemic, and so we know it's a vicious cycle — we assume it's a vicious cycle — that has never been caught up with, that these women are anemic to begin with, while they haven't corrected their own anemia, and they are then frequently pregnant and the — as you may know, the infant serves as a parasite in a sense on the mother so that this further depletes her resources at the expense of the mother. But if the mother can't keep up with it, then further depletion occurs in the infant, and when we talk about failure — well, this has its effect on the infant and then — which may be too late at that point to reverse the cycle.

Q. Could you tell the Court what the effect is on an infant to complete the example?

A. Low birth weights, dysmature behavior, failure to

gain weight subsequently, lowered resistance to — resistance to further insults, nutritional insults, in fact, that can be shown, decrease in — or failure to develop, myelinization of the brain, which is something that has to occur during the next year of life, which is inhibited by prenatal malnutrition, and there is some suggestion, although more study needs to be done, on documentation of actual low — lowered I.Q.s and lowered school performance, lowered behavior norms in infants who are born of malnourished mothers.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA WISDOM, ET AL
Plaintiffs, Appellees

VS.

NICHOLAS NORTON, ET AL
Defendant, Appellants

DOCKET NO. 74-1402

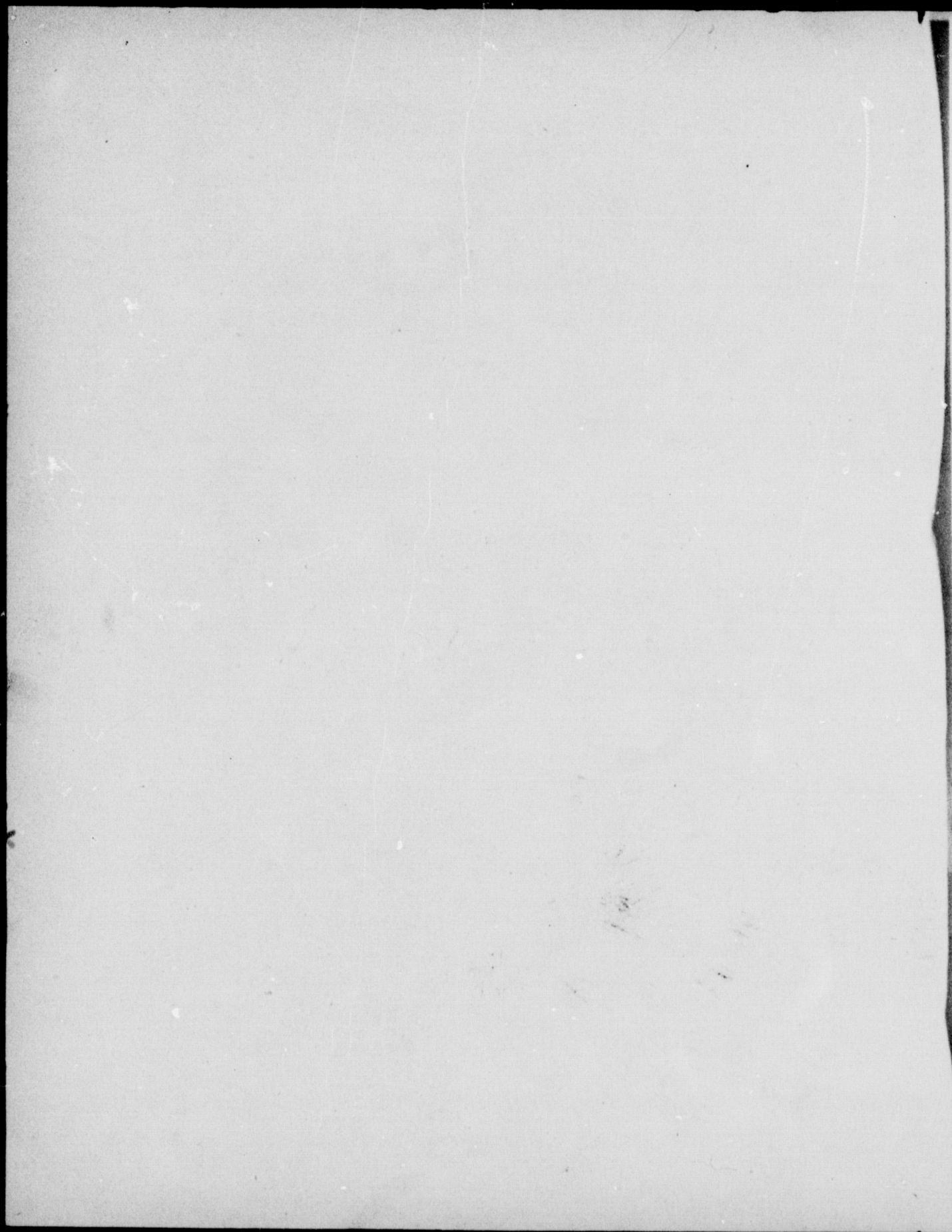
CERTIFICATION

This is to certify that one (1) copy of the Supplemental Appendix to Brief of Appellants was mailed on the 10th day of May, 1974 and on the 15th day of May, 1974, to the following counsel of record:

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